

Questions and Answers Q's & A's

Federal Register Notice for 36 CFR Part 215

Notice, Comment and Appeal Procedures for Projects and Activities on National Forest System Lands

AGENCY: Forest Service, USDA Forest Service

BACKGROUND

1. Q) Why did we change the rule?

The original appeal rule was promulgated in 1993. Ten years of experience with the rule and unsolicited comments about these notice, comment, and appeal procedures showed the need for 1) change to encourage early and meaningful public participation during project planning, and 2) streamlining to align the appeal procedure with agency efforts to reduce process predicament. Some changes which accomplish both desires include: flexibility with timing of the 30-day comment period, what type of comments to provide, who may appeal, emergency situation determinations.

2. Q) What is the intent of the final rule?

The intent of the final rule is to achieve better decisions on National Forest System lands through public participation before the final decision is made. More specifically, the final rule encourages early, frequent, and meaningful public participation during project planning rather than using the appeal process as an “after the fact” public involvement forum. Additionally, the changes are intended to make the rule easier to use and are expected to result in more informed decisions achieved in an efficient manner, and an easier to understand appeal process.

3. Q) Is this an Administrative or Forest Service attempt to modify or circumvent existing environmental laws?

No. The Forest Service is fully committed to the intent of existing environmental laws. Those laws represent the foundation upon which any processing streamlining efforts must be made. The final rule complements the NEPA, NFMA, and their respective regulations, while nothing in this part provides an exemption from these laws. Other changes to the rule more nearly reflect Congress's original intent.

4. Q) What kinds of decisions are addressed by the final rule?

The final rule applies to site-specific projects which implement a land and resource management plan for a National Forest, Grassland, or Prairie, including research projects that are not categorically excluded from documentation in an EIS or EA.

5. Q) When is this rule effective? Is there a transition period?

The final rule is effective immediately upon publication in the **Federal Register**, with an exception for the paragraphs regarding receipt of electronic comments and appeals) see question #8 below). That is, projects or activity decisions for which the legal notice for

opportunity to comment is published on or after the date of **Federal Register** publication will be subject to the revised rule.

Regarding transition, projects and activities, for which legal notice for opportunity to comment is published prior to the effective date of the final rule, will be subject to the notice, comment, and appeal procedures of part 215 in effect prior to the date of Federal Register publication. However, effective immediately upon Federal Register publication, the Forest Service will cease to implement the procedures set forth in the interim provisions of the *Heartwood Inc. v. United States Forest Service* settlement agreement discussed in detail in preamble discussion of proposed section 215.4.

6. Q) Since the proposed rule indicated that the final rule would be effective 30 days after its publication in the Federal Register, why is it effective immediately?

While it is not uncommon for rules to become effective 30 days after publication, sometimes circumstances may dictate otherwise. Such is the case for the 215 Appeal Rule. The Department has elected not to delay the effective date of the final rule to reduce confusion resulting from implementation of interim procedures established through the *Heartwood Inc. v. United States Forest Service* settlement agreement.

7. Q) OK that's twice, what is the connection of this rule revision to the *Heartwood Inc. v. United States Forest Service* settlement agreement?

See answer #16 in the Specific Topic section below.

8. Q) Why is the provision for electronic comments not effective for 30 days?

The final rule provides for a 30-day delay in implementation of the provisions for electronic comments and appeals. Even though the final rule becomes effective immediately, it will take some time to establish electronic mailboxes across the Forest Service to receive electronic comments and appeals.

TELL ME ABOUT THE PUBLIC COMMENTS

9. Q) How many comments were received?

On December 18, 2002, the Forest Service published the proposal to revise the appeal rule at 36 CFR 215. A 60-day comment period was provided. In addition, the Forest Service gave direct notice of the proposed revision and invited comment from more than 150 national organizations and federal agencies. Comment letters were received from individuals; representatives of Federal, State, and local government agencies; environmental groups; Indian tribes; professional associations; and both commodity and non-commodity industry groups. Responses consisted of nearly 1,100 individual letters and about 25,000 form letters.

10. Q) Did you consider the comments when making changes to the final rule?

All suggestions and comments were reviewed and considered in preparing the final rule. In fact, several of the changes between the proposed and final rules are based on comments received from the public during the comment period. Other changes were made based on comments from internal reviewers. A more detailed discussion of the

comments received and the Forest Service response can be found in the Preamble to the Final Rule.

CHANGES

11. Q) What are the biggest changes between the proposed rule and the final rule?

Changes of note include:

- The Appeal Deciding Officer (ADO) is the next level supervisor of the Responsible Official; therefore Forest Supervisors are ADO's for District Ranger decisions. In the 1993 rule, ADOs were Regional Forester and above.
- A new provision is made in the final rule to require a legal notice for projects requiring an EIS under this part. With the 1993 rule, the existing CEQ regulations for notice and comment were sufficient for projects for which an EIS was prepared. See question # 23 for more detail.
- Removal of the requirement that any issue raised in an appeal must first have been raised during the comment period. You still must provide comments during the comment period in order to be eligible to file an appeal.

12. Q) What are the biggest differences between the final rule and the 1993 rule?

The biggest differences between the final rule and the 1993 rule include clarification of emergency situations; more flexibility in timing of the notice and comment period; encouraging comments to be project-specific; clarifying appeal eligibility; and clarifying who may appeal project decisions; provision for electronic submission of comments and appeals, as well as the first two changes mentioned in # 11.

RELATIONSHIP TO PROCESS PREDICAMENT & HEALTHY FORESTS INITIATIVE

13. Q) How do these changes address the agency initiative on the process predicament issue?

The Forest Service believes it was time to reevaluate our tools and processes if we are truly committed to sustainable land management. The final rule is one step in this direction, encouraging people to participate early and meaningfully in project planning, while clarifying and simplifying the appeal process.

14. Q) How does this revision relate to the other administrative actions under the President's Healthy Forests Initiative (HFI)?

The Healthy Forests Initiative, as announced August 22, 2002, noted that "projects are often significantly delayed and constrained by procedural delays" The final rule for the notice, comment, and appeal procedures is intended to encourage early, frequent, and meaningful public participation. As an example, increased flexibility with the comment period could save as much as 30 days during project planning.

The final rule further clarifies some areas of confusion in the old rule and reduces appeal procedure complexity, such as allowing delegation of emergency situation determinations to Regional Foresters.

SPECIFIC TOPIC Q & A's

15. Q) Why aren't categorically excluded projects subject to this rule?

In drafting the language of the Appeal Reform Act (ARA), Congress did not express a specific intent regarding where the “line should be drawn” regarding which activities would be subject to notice, comment and appeal. While both agency policy in FSH 1909.15 and regulations at 40 CFR 1508.4 made provision for public involvement in categorically excluded actions for many years prior to passage of the ARA, Congress knew that not every decision of the Forest Service was subject to appeal before they passed the ARA. Through the 1993 rulemaking process, the Secretary concluded that the Forest Service's categorically excluded activities were generally not of the sort that Congress intended to apply additional notice, comment and appeal requirements given the generally minor potential for environmental effects.

It is clear that Congressional intent was to streamline the appeal process, not entangle the agency in a costly and time-consuming exercise for minor decisions by Forest Service decision makers. Thus, proposed activities that are categorically excluded are exempt from the revised rule. It is important to note that, while projects and activities that the Forest Service categorically excludes are not subject to this rule, nothing in this part exempts them from NEPA.

16. Q) How does the final rule affect the *Heartwood Inc. v. United States Forest Service* settlement agreement?

Several years ago, Heartwood, Inc. filed litigation challenging the 1993 regulations at 36 CFR part 215 implementing the Appeal Reform Act. On September 15, 2000, a Federal District Court approved an agreement to settle this litigation in which the Forest Service agreed that notice, comment and appeal procedures would be applied to certain projects and activities set forth in the settlement agreement for decisions made after October 24, 2000.

The settlement agreement also anticipated that a subsequent rulemaking process, with an opportunity for public comment on the rulemaking, would supersede these interim procedures. Therefore effective immediately upon publication, the Forest Service will cease to implement the procedures set forth in the interim provisions of the *Heartwood Inc. v. United States Forest Service* settlement agreement. A detailed discussion can be found in the preamble discussion of proposed section 215.4.

17. Q) Why was Categorical Exclusion 4, Timber Harvest removed?

As discussed in the preamble for the proposed revision, it was removed because the Forest Service no longer uses a timber harvest categorical exclusion of that nature. However, subsequent to publication of the proposed revision to part 215, the Forest Service published proposals for new categorical exclusions for limited timber harvest (67 FR 1026, January 8, 2003) and for fire management activities (67 FR 77038, December 16, 2002). It is important to note that the proposed categorical exclusions are not of the same nature and not intended to replace the former Categorical Exclusion 4. These new categorical exclusions are limited by size and application and are more specific about the types of harvest methods when compared to the Forest Service's former Categorical

Exclusion 4. The proposed categorical exclusions are, therefore, much more limited in scope than the former Categorical Exclusion 4.

18. Q) Why did the final rule allow Forest Supervisors to be Appeal Deciding Officers?

The final rule provides for the next higher-level supervisor of the Responsible Official to be the Appeal Deciding Officer, rather than Regional Foresters and above. When the 1993 was developed, the Forest Service thought that a more centralized approach would promote efficiency. However, the Appeals Reform Act (ARA) does not require elevating decisions to a central point. This change is in line with other efforts addressing process gridlock.

19. Q) Why does the final rule require substantive comments for appeal eligibility?

As noted in discussions prior to enactment of the ARA and in the **Federal Register** notice announcing the proposed revision (67 FR 77451), the notice and comment period is intended to solicit information, concerns and any issues specific to the project and to provide such comments to the Responsible Official before the decision is made. The intent in requiring substantive comments is to obtain meaningful and useful information from individuals about their concerns and issues, and use this to enhance project analysis and project planning.

20. Q) Why is the definition of “emergency situation” being modified?

The definition has been modified because emergency situations occur that were not covered by the old regulation including loss of economic value. The change broadens the definition of emergency situations to increase the agency’s ability to address emergencies impacting forest ecosystems and damaged watersheds resulting from fire, storm, or other events.

21. Q) Why has “loss of economic value” been added to the definition?

At times, when a decision to remove burned or infected trees has been made, delayed implementation can affect the feasibility of cost-effective removal. The delay could result in further damage to the resource.

22. Q) How is “emergency situation” defined and who makes the determination?

An “emergency situation” is defined as one in which a proposed action on National Forest System lands would provide relief from hazards threatening human health and safety or natural resources on National Forests or adjacent lands; or that would result in substantial loss of economic value to the Government if implementation is delayed. Furthermore, the old regulation appeared to reserve this determination solely for the Chief. The Appeals Reform Act does not mandate such a reservation. The final rule improves efficiency by allowing other designated agency officials to make an emergency situation determination.

23. Q) Why does the revised rule require a legal notice for projects requiring an EIS when CEQ procedures already require a Notice in the Federal Register?

Provision is made in the final rule to require a legal notice for projects requiring an EIS under this part. The 1993 rule for notice and comment did not apply to projects for which an EIS was prepared because the existing CEQ regulations met the requirements for notice and comment. Under the final rule, appeal eligibility requirements and procedures for filing electronic submission are spelled out in the legal notice for projects for which an EA is prepared. It is appropriate to provide the same information to those wishing to comment on projects for which an EIS is prepared.

24. Q) Why is there a discussion in the Preamble about the applicability of this rule to Forest Service developed Section 4(e) conditions for FERC (Federal Energy Regulatory Commission) projects?

There were several commenters who believed that the addition of paragraph 215.12(h) regarding concurrences and recommendations to other Federal agencies, meant that Forest Service "terms and conditions" under Section 4(e) of the Federal Power Act (FPA) would no longer be appealable under this rule. However, this paragraph was added to clarify situations when the agency was asked for concurrences and/or recommendations on other Federal agencies' projects where the Forest Service had no jurisdiction for making a decision.

The addition of paragraph 215.12 (h) "concurrences and recommendations to other agencies" has no bearing upon the Forest Service's issuance of terms and conditions under section 4(e) of the FPA. The new language is intended to clarify that there would be no appeal opportunity in those instances where the Forest Service is only concurring with another agency's decision or issuing non-binding recommendations. The proposed language of paragraph 215.12 (h) is inapplicable in the FPA context, as the Forest Service's issuance of 4(e) terms and conditions does not constitute a "concurrence" with the Federal Energy Regulatory Commission's (FERC's) licensing decision and is binding in nature. The Forest Service is in the process of reviewing its Hydropower Manual and Handbook, in coordination with the current ongoing FERC hydropower licensing rulemaking and will clarify portions addressing NEPA disclosure documents.

25. Q) What is the relationship between the National Environmental Policy Act (NEPA) and the Appeal Reform Act (ARA)?

Clarification is needed to differentiate between the "notice and comment provisions" of this rule (36 CFR 215) pursuant to the ARA and "scoping" pursuant to NEPA. The section in this revised rule, regarding the 30 and 45 day comment periods for EAs and EISs respectively, meets the requirements of the ARA. This rule is not related to nor does it affect anything in the implementing regulations for NEPA (40 CFR parts 1500-1508) or agency policy in FSH 1909.15. Further, nothing in this final rule inhibits public participation in project planning. In the case of EISs, the Department has chosen to meet the ARA requirements by utilizing the notice and comment period on a draft EIS required by 40 CFR parts 1503 and 1506.10 rather than provide two separate comment periods. Forest Service Handbook 1909.15 and 40 CFR parts 1500-1508 do not specify a comment period for EAs.

26. Q) Why is a new section added about the Secretary's authority?

This section was added to set out the relationship between the Secretary of Agriculture and the Forest Service concerning decision-making and the rules of 36 CFR 215. The 1993 rule was silent on this subject. Congress has charged the Secretary with the responsibility to protect, manage and administer the national forests. The Secretary has delegated that mission to the Under Secretary for Natural Resources and Environment and the Forest Service. USDA's general regulations make it clear that the Secretary and Under Secretary of Agriculture retain authority to make decisions on matters that have been delegated to the Forest Service. Nothing in the ARA alters the Secretary's long-established authority to make decisions affecting the Forest Service. The ARA directed the Secretary to promulgate rules to "establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans . . . and shall modify the procedure for appeals of decisions concerning such projects." Secretarial decisions have never been subject to appeal under any of the Forest Service's administrative appeal systems and there is no indication that Congress intended to work such a change through the ARA. Nothing in this section allows a Responsible Official, Departmental or Forest Service, to avoid any applicable notice and comment requirements; for example, circulating a draft or supplemental EIS for comment (40 CFR 1505.2).

27. Q) Why did the proposed rule require a signature for comments and appeals and now the final rule says either sign them or verify identity upon request?

The final rule says "...for appeal eligibility, each individual or representative from each organization submitting substantive comments must either sign the comments or verify identity upon request". There is similar language regarding filing of appeals. Because appeal eligibility is linked to commenting, the Department must be able to verify who submitted substantive comments. However, after reviewing the public comment on the proposal to require a signature, the final rule clarifies that verification of the commenter's identity is required for appeal eligibility but that a signature will normally satisfy that requirement. If a signature is not provided or is illegible, the commenter may be asked to verify authorship. With regard to those who provide oral comments, the final rule addresses the concern of verification in the same manner as those providing comments by other means.

28. Q) Why is there a distinction between individuals and organizations?

This addition to the regulation is intended to address difficulties encountered in implementation of the 1993 rule in regard to who was actually submitting comments when multiple names or organizations were listed on the submission but there was only one signature. There is nothing in this section that prohibits individual members of an organization from submitting the same or similar comments and from their establishing eligibility to appeal, providing they meet all other requirements.